XI-HC-22

उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

P.U.D

आदेश पत्रक

मामला क्रमांक Cr. M.P. 27 सन् 2007

In reference विरुद्ध State of C.G. through P.S. Durg.

(12)

आदेश का दिनांक आदेश क्रमांक सहित	आदेश हस्ताक्षर सहित	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश
		23-01-07 P.U.D. Registered as more in comp of RCJ) order dated 19-01-07 in the reference made by court of 8th A.S.J. (F.T.C.) Durg in connection with M.J.C. - S.T.N. 35/76 L.C record attached

AFR

HIGH COURT OF CHHATTISGARH AT BILASPUR

Cr.M.P. No.27 of 2007

In reference

Vs.

State of Chhattisgarh

POST FOR ORDERS ON 28th November, 2007

Sd/-
DHIRENDRA MISHRA
Judge

27.11.2007

(19)

HIGH COURT OF CHHATTISGARH AT BILASPUR

Cr.M.P. No.27 of 2007

In reference

Vs.

State of Chhattisgarh

Present:

Mr. Satyawan Agarwal, Advocate for the applicant.
Mr. G.K. Beriwal, Dy. Advocate General for the State.
Mr. Ranbir Singh Marhas, Advocate for the convict.

ORDER

(Passed on 28th November, 2007)

Dhirendra Mishra, J

1) This is a reference made by learned 8th Additional Sessions Judge, (Fast Track Court), Durg under Section 395 (2) of the Code of Criminal Procedure, 1973 (for short 'Code').

2) From perusal of the record of the court below it appears that a miscellaneous case was registered on the basis of memo dated 9.1.2004 of the District & Sessions Judge, Durg in compliance of memo dated 4.12.2003 of this Court, as certain complaints were received in the High Court that conviction of convict Nand Kishore Khandelwal under Sections 450, 366, 376, 324 & 342 of the Indian Penal Code (for short "IPC") and sentence of R.I. 1 year, R.I. for 3 years, R.I. for 3 years, R.I. 6 months and fine of Rs.500/- recorded by the Additional Sessions Judge, Durg in S.T. No.35/76 was confirmed by the High Court in Criminal Appeal No.804/76 and subsequently, S.L.P. (Criminal) No.631/1979 was further dismissed by the Hon'ble Supreme Court on 9.2.1994. However, convict Nand Kishore has not surrendered for undergoing the substantive sentence imposed upon him. The original record of Sessions Trial No.35/76 was received in the Sessions Court, however, the same is not traceable in the record room of the District Court and the same is not likely to be traced. Notice was

issued to convict Nand Kishore on 24.12.2005 whereupon he appeared before the trial court on 4.3.2006 through his advocate and his advocate was directed to keep the convict present on each date. However, on the prayer of Nand Kishore that he is not getting justice and he intends to file transfer petition, the proceeding was adjourned for 19.12.2006. On 19.12.2006 no stay order was produced by convict Nand Kihsore and an application for exemption from personal appearance on that date was filed, which was rejected by learned Additional Sessions Judge and warrant of arrest was directed to be issued. The trial court has also observed that original record of Sessions Trial No.35/76 is not available and there is no likelihood of tracing the above record and in this circumstance the preparation of execution warrant in the absence of original record would be contrary to the Rule 384 of the Chhattisgarh Rules & Orders (Criminal) (for short "Rules") and as such illegal. It has been further observed that Rule 389 provides that warrant and its endorsement must be signed in full by the presiding officer of the court, as the presiding officer is responsible for the correctness of the warrant and he is bound to satisfy himself that it is correct before signing it. Further referring Rule 575 it has been observed that in the register of miscellaneous proceeding only the cases enumerated under Rule 575 are to be entered and without the order of High Court no addition shall be made thereof and therefore, this case cannot be registered without permission of the High Court in the register of miscellaneous proceeding. With these observations following questions have been raised by way of reference under Section 395 (2) of the Code;-

i. Whether in the absence of original record preparation of execution of warrant would be legal?

ii. Whether it would be legal for the Presiding Officer to make endorsement and put his signature in the execution warrant of sentence?

iii. Whether without specific order of the High Court the present case may be entered in the register of miscellaneous proceeding?

3) Needless to say that a reference on a question of law should be made by a Subordinate Court under sub-section (2) of Section 395 of the Code only for some compelling reasons in extraordinary circumstances. In the instant case there is no factual dispute, as the conviction of convict Nand Kishore recorded by the Sessions Court has been subsequently confirmed by the High Court and thereafter a S.L.P preferred by the convict has also been dismissed by the Supreme Court way back in the year 1994. It is also not in dispute that the accused was on bail during pendency of his appeal before the High Court and thereafter before the Supreme Court and even after dismissal of his appeal he did not surrender.

4) Learned Additional Sessions Judge after referring Rule 384 of the Rules has observed that preparation of warrant of execution against the convict in the absence of original record would be contrary to the Rule 384 and as such illegal. Rule 384 only mentions that warrant of execution is to be prepared invariably from the original record and never under directions orally given by the presiding officer. Original record mentioned in this rule necessarily implies only the judgment delivered by the trial court by which the accused has been sentenced and it only mandates that the warrant is to be prepared only on the basis of final judgment passed by the trial court and never under directions orally given by the presiding officer. Where any party to the proceedings prefers an appeal and the same is finally adjudicated by the superior court, the original judgment merges in the judgment of the

superior court. After any accused is finally convicted and sentenced by the Supreme Court, the only duty to be discharged by the trial court is to ensure that convict undergoes the sentence finally imposed upon him.

5) Where original record is not traceable and the court competent to issue warrant of execution of sentence is satisfied that the original record is not traceable, as the same is lost, necessary judgment of conviction and order of sentence may be obtained by requisitioning the original judgment of the appellate courts prepared on the basis of appeal preferred by the convict. It is grossly shocking and unfortunate that the convicted/accused instead of surrendering before the trial court for undergoing the remaining sentence has taken a stand before the court below that in the absence of original record of sessions trial he cannot be committed to prison for undergoing the remaining sentence. It is equally shocking that the court below instead of making endeavour to obtain certified copy/second copy of the lost judgment has made this reference that too after recording his observation that preparation of execution of warrant in the absence of original record would be illegal in view of Rule 384 of the Rules.

6) Now coming to the first point of this reference namely 'whether in the absence of original record preparation of execution of warrant would be legal', Rule 384 only mentions that warrant is to be prepared invariably on the basis of original record and never under directions orally given by the presiding officer. Where original judgment is not traceable for one reason or other, the executing court is duty bound to obtain certified/second copy of the lost judgment of conviction and order of sentence and on the basis of such copy warrant of execution is to be issued by the court which passed the sentence. The only bar under Rule 384 is that it is never

to be prepared under directions orally given by the presiding officer. Where original judgment convicting the appellant is lost along with record and the executing court is satisfied that the same cannot be traced, the certified copy or the copy issued to the accused at the time of passing the judgment, which has been subsequently filed by the convict along with his appeal preferred before the High Court, if available, may be obtained and on that basis warrant of execution can be issued. There is no question of law involved which needed reference under Section 395 (2) of the Code on this count and as such, there is no scope for making any reference to this Court by the court below on this point.

7) Similarly second point of this reference namely 'whether it would be legal for the Presiding Officer to make endorsement and put his signature in the execution warrant of sentence' is concerned, I am constrained to say that it is not only irrelevant but also dereliction of duty on the part of the referring court as the executing court. Learned Additional Sessions Judge is presiding the Court in which trial of the convict was conducted and it is his duty to issue warrant of execution against the convict after his appeal has been finally dismissed by the Hon'ble Supreme Court and thus, all necessary steps, which are required under the law for issuing warrant of execution, are to be discharged.

8) The third point of this reference namely 'whether without specific order of the High Court the present case may be entered in the register of miscellaneous proceeding' is also unnecessary and irrelevant, as warrant of execution of sentence is to be issued in the normal course and missing of original record of S.T. No.35/76 cast a duty on the trial court to obtain certified copy/second copy of the lost judgment of conviction and order of sentence and on the basis of such copy of judgment, issue warrant of execution of sentence.

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9) Original record of the High Court of M.P. of Criminal Appeal No.804/76 has already been received along with the judgment rejecting the appeal. Certified copy of judgment dated 9.2.1994 passed in S.L.P. (Criminal) No.631/79 by the Hon'ble Supreme Court is also received. Free copy of judgment dated 4.9.1976 passed by learned Sessions Judge, Durg given to the convict Nand Kishore is also available in the record of appeal preferred by the convict before the High Court in which details of sentence undergone by the convict Nand Kishore Khandelwal is mentioned. Registry is directed to make available all these records to the learned Additional Sessions Judge concerned for his perusal.

10) With the aforesaid observations and directions, the reference stands disposed of.

Sd/-
DHIRENDRA MISHRA
Judge

Roshan/-